IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1177 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

LIYAKAT ALI KALUMIYA

Versus

STATE OF GUJARAT

Appearance:

MR EE SAIYED for Appellants

MR YU MALIK for Appellants

MR LR PUJARI, APP for Respondent No. 1

CORAM : MR.JUSTICE D.K.TRIVEDI
and
MR.JUSTICE J.R.VORA

Date of decision: /05/2003

C.A.V. JUDGEMENT (Per : MR.JUSTICE J.R.VORA)

1. This Appeal is preferred by the accused of Sessions Case No. 145 of 1994 against the judgment and order of learned Addl. Sessions Judge, Ahmedabad (Rural), Mirzapur, recorded on 24.11.1994, convicting both the appellants for the offence under Section 302 read with Section 34 of the Indian Penal Code and sentencing each of the appellants for life imprisonment and imposing fine of Rs.5,000/-, in default, imprisonment of five years. It is also directed that the amount of Rs.5,000/- out of the fine, if paid, by the appellants, shall be compensated to the family members of the deceased.

2. The incident, culminated in the above said criminal trial for murder of one Abdulrashid Ismailbhai Shaikh, occurred on 19.4.1994 at 1730 hours at village Pethapur, Taluka - Gandhinagar. The complaint before the police is given by Babubhai @ Juberahmad Ismailbhai, elder brother of the deceased. On the fateful day, Babubhai, PW-1, Exh. 18, after closing his shop of cycle repairing, was proceeding towards his house and reached near the garden known as Sitabai Wadi. At that juncture, Babubhai @ Juberahemad and PW-3 Yakubkhan Akbarkan Pathan, Exh.22, were standing on road near the hand-cart of PW-2 Noormahammed Nazarmahmed Pathan. PW-2 was also present at his cart on which he was preparing and selling samosa. They saw deceased Abdulrashid Ismailbhai Shaikh coming on road from GEB side near the scene of offence. While deceased was about to reach near PW-1, PW-2 and PW-3, both the accused - appellants accosted the deceased Abdulrashid that as to why Abdulrashid was not entering into compromise in the case pending between them. The conversation culminated into hot altercation and accused No.1 Liyakatali Kalumiya Saiyad gave filthy abuses to the deceased. Accused No.2 thereafter caught hold of deceased by the hands and appellant No.1 Liyakatali Kalumiya took out a knife from his waist and gave two blows to the deceased one after the other on chest and the second one on abdomen. Babubhai @ Juberahmad Ismailbhai, PW-1 including PW-2 and PW-3 attempted to intervene but appellant No.2 Nisharahmed @ Katu Jahangirmiya Shaikh threatened them not to intervene and thereafter both the accused ran away from the scene of offence. Abdulrashid was seriously injured, had fallen down on the ground and after struggling for sometime for life, he succumbed to the injuries and was dead. Babubhai @ Juberahmed Ismailbhai thereafter had gone to GEB Colony to inform his eldest brother about the incident. The residence of the eldest brother of

Babubhai was situated about 1 1/2 Kms. away from the scene of offence. Babubhai brought his eldest brother to the scene of offence and thereafter went to the Police Station for recording of the complaint. PW-7 Pravinchandra Harichandrasinh, PW-7, Exh. 31 was Police Station Officer of Pethapur Police Station and he recorded the complaint of Babubhai as dictated by him. Thereafter, the offence was registered against both the accused - appellants at 1915 hours. PW-7 Head Constable Pravinchandra entrusted the investigation to the Head Constable Arjunsinh who rushed at the spot to draw inquest panchnama. The inquest panchnama of the deadbody was prepared by Arjunsinh from 19.30 to 20.00 hours. Deadbody of Abdulrashid then was shifted to Pethapur Hospital on the same day and postmortem was performed by Dr. Devang Shah, PW-5 on 20.4.1994. On 19.4.1994, at about 20.10 hours Police Sub-Inspector of Pethapur Police Station, PW-8 Najibhai Kalasava took the charge of the investigation of the offence from Head Constable Arjunsinh. He recorded the statements of witnesses including PW-2 and PW-3 on 19.4.1994 and also recorded the further statement of complainant PW-1. Early on 20.4.1994, PW-8 I.O. drawn the panchnama of scene of offence in the presence of panchas from 7.00 hours to 8.00 hours and recorded the statements of other witnesses. On 6th of May, 1994, both the accused appellants were apprehended from the cave of River Sabarmati and were brought to Pethapur Police Station. On 6.5.1994, from 19.00 to 2000 hours, the panchnama of recovery of clothes of both the accused as well as arrest panchnama were drawn by the Investigating Officer. On 7.5.1994 at 6.30 hours to 7.45 hours, discovery panchnama was also drawn by the Investigation Officer in the presence of panchas where appellant No.1 Liyakatali, according to the prosecution case, had shown his willingness to recover the knife used in the crime from the cave of River Sabarmati. After investigation was over, both the appellants were charged with the offence punishable under Sections 302, 504 read with Section 34 of the IPC. Learned Trial Judge vide Exh. 5 framed the above said charges against both the accused to which they pleaded not guilty and hence the prosecution tendered oral as well as documentary evidence to prove its case.

3. The prosecution examined PW-1 Babubhai Juberahmed Ismailbhai at Exh. 18, PW-2 Noormohammad Nazarmahmed Palani, Exh.21 and PW-3 Yakubkhan Akhbarkhan Pathan, Exh.22 as eye witnesses of the incident. All the three eye witnesses supported the prosecution case and stated that the incident occurred at 1730 hours near Sitabai Wadi at village Pethapur where all the eye

witnesses were standing near the hand-cart of PW-3 Yakubkhan, who was doing the business of selling samosa and at that time Abdulrashid - deceased came from GEB colony and was proceeding towards three witnesses standing near the larry of Yakubbhai when Abdulrashid accosted by both the accused. Accused No.1 asked the deceased as to why Abdulrashid was not compromising the cases between them. Accused No.1 Liyakatali uttered filthy abuses and he was excited. Accused No.2 Nisharahmed caught hold of the deceased by the hands and accused No.1 Liyakatali inflicted two knife blows to the deceased after taking knife from his waist. The blows landed on chest and abdomen. On attempt to rescue the deceased, accused No.2 threatened all the three witnesses not to intervene. On other persons gathering at the scene of offence, both the accused ran away towards River Sabarmati.

4. Prosecution examined Jeevnakhan Kajimiya, PW-4, Exh. 23 as panch of scene of offence and panch of recovery of clothes of deceased. PW-4 Jeevnakhan in all respects supported the panchnama of scene of offence at Exh. 24 and panchnama at Exh. 25 of recovery of clothes of deceased.

5. Dr. Devang Shah has been examined at Exh. 26 as a Prosecution Witness No.5. He deposed that the dead body was brought to him at 1930 hours on 19.4.1994 and he started postmortem on 20.4.1994 at 1100 hours and completed at 1240 hours. He deposed that the deceased had the following external injuries:

" (i) Piercing wound obliquely situated over front of lt. side of chest (over 7th intercoscal space) which is 2 cms away from midline. Aperture of the wound is 4 cms x 2 cms and clear cut edges with acute angles. Wound is going upwards, backwards and to the lt. In the chest cavity and depth of it is 11 cms.

(2) Piercing wound vertically situated over lt. side of epigastric 1 cm away from midline and 2 cms below from injury No.1 Aperture of the wound is 4 cms x 2 cms and clear cut edges with acute angles. Wound is directed towards backwards, upwards and to the lt. and depth of it is 6 cms. "

The Doctor deposed that the injuries were antimortem and there were corresponding following internal injuries.

(1) Clear cut two incise wounds over pericardium which coincise with the injury No.1 & 2 of column No.17.

250 gms (1) perforating wound over ant. surface of lt. ventricle, which is oblique.

- Spindle shaped & approximately 3 1/2 cms x 1 1/2 cms in size and coincise with the injury No.1 of Col. No.17.

(2) Perforating wound over post surface of Rs ventricle which is coincise with the root of injury No.1 of Col. 17 which is spindle shapes. 2 cms x 1 cm in size.

(3) Perforating wound over ant. surface of lt. ventricle which is coincise with injury No.2 of Cl. No.17.

According to Doctor, the cause of death was hemorrhagic shock due to injuries to vital organ (heart). The Doctor produced the postmortem note which was exhibited as Exh. 27. In examination-in-chief, he admitted that the injuries were possible by the knife of muddamal while in examination-in-cross, he stated that these injuries were not possible by the weapon like mudammal knife because the injuries were possible by the weapon which had both sharp edges. The evidence will be discussed later on.

6. Prosecution examined Babulal Shivlal Sharma, at Exh. 28 as PW-6 who was panch witness in panchnamas Exh. 29 and Exh.30. Panchnama Exh.29 is discovery panchnama prepared on 7.5.1994 at 6.30 to 7.40 hours wherein accused No.1 voluntarily disclosed before the panchas to discover the knife used by him in the crime. However, the Panch witness No.6, Babulal Sharma though he is not treated hostile, did not support wholeheartedly the panchnama Exh. 29. He was also the panch of Panchnama Exh.30 by which the clothes of both the accused were recovered on 6.5.1994 at 1900 hours and accused were arrested at 2000 hours. The panchnama was drawn between 1900 hours to 2000 hours.

7. Prosecution examined Pravinchandra Harichandra Sinh as PW7 at Exh. 31 who was in-charge of Pethapur Police Station on 19.4.1994 and at about 17.00 to 17.15 hours PW-1 Babubhai @ Jubarahmed Ismailbhai appeared before him and declared his complaint which was recorded by this witness as dictated by complainant Babubhai Ismailbhai Shaikh. The said original complaint which is

the First Information Report is produced on record at Exh. 20.

8. The Investigating Officer Najibhai Kalasva, PW-8, has been examined at Exh. 32 by the prosecution. He deposed that he took over the investigation from Arjunsinh at 2010 hours on 19.4.1994. Since it was not possible to draw the panchnama of scene of offence on the same day because of night fall, on 20.4.1994, at about 7.00 hours to 8.00 hours in the presence of panchas which is at Exh.24, panchnama of scene of offence was drawn by him. On the day of incident i.e. on 19.4.1994, he recorded the further statement of complainant Babubhai and the statement of two eye witnesses. He recorded other statements as well. The accused were arrested and apprehended from the cave of River Sabarmati on 6.5.1994. Their arrest panchnama was drawn by him from 1900 hours to 2000 hours and next day he also in the presence of panchas drawn the panchnama of discovery of knife on 7th May, 1994 in the early hours of day.

9. The prosecution has produced on record the inquest panchnama at Exh. 10 drawn at 1930 hours to 2000 hours on 19.4.1994, which is admitted by the accused and exhibited. Muddamal i.e. the knife recovered from accused No.1, clothes of both the accused, clothes of deceased and the blood samples of the scene of offence including sample earth were sent to Forensic Science Laboratory vide Letter at Exh. 12 and the opinion of Forensic Science Laboratory is produced at Exh.15.

10. Learned Advocate Mr. Saiyed attacked the case of the prosecution on the ground that no independent witnesses have been examined by the prosecution. Both the witnesses PW-2 Noormohammad Nazarmohammad Palani as well as PW-3 Yakubkhan Akhbarkhan Pathan, according to learned Advocate Mr. Saiyed, are interested witnesses and their evidence cannot be relied upon. It was submitted that complainant Babubhai Exh.19 does not inspire confidence inasmuch as his conduct after the event is not natural. According to Mr. Saiyed, Pethapur Police Station is at a distance of 70 to 80 feet from the scene of offence and instead of going to Police Station, PW-1 Babubhai had gone to inform his eldest brother at GEB colony situated at a distance of 1 1/2 Kms. It was argued that none of the witnesses present at the scene of offence tried to intervene in the quarrel more particularly when deceased was the younger brother of PW-1. It was argued that GEB Colony is situated at a distance of 1 1/2 Kms, even then, Babubhai walked upto the residence of his eldest brother instead of rushing

there and complaint allegedly had been filed at 1915 hours after delay even though the Police Station is situated nearby the scene of offence. The conduct of Babubhai thus discredits his evidence. It was argued that otherwise also the evidence of complainant is required to be discarded because he made improvements in his evidence and stated about two blows inflicted by the deceased while in the complaint at Exh. 20 he stated about one blow on the chest. Not only that, it was stated that in compliant Exh. 20, PW-1 never stated about the threats given by Nisharahmed about the intervention of Babubhai and other witnesses. According to Mr.Saiyed, these are material contradictions, vitiating the prosecution case. He further stated that both other eye witnesses i.e PW-2 and PW-3 are interested witnesses residing in the same mohlla in which PW-1 resides, as admitted by the witnesses. It was argued that the map which is at Exh.17 does not show the pangalla of PW-3 Yakubkhan nor the handcart of PW-2 on which PW-2 Noormohamad was preparing samosa and selling them. It was argued that the discovery panchnama at Exh. 29 cannot be said to have been proved by PW-6 Babulal Sharma. It was argued that PW-6 Babulal Sharma is a Barber and a police panch and, therefore, he was called as a panch by the Police in two panchnamas at Exh. 29 and Exh. 30. It was argued that his evidence does not inspire confidence and otherwise also according to deposition of PW-6 Babulal Sharma since the discovery of the knife is not at the instance of the accused No.1, the evidence in this regard is required to be discarded. Likewise, he also argued that PW-4 Jeevnakhan Kajimiya who is panch of panchnamas at Exhibits 24 and 25 of scene of offence as well as recovery of clothes of deceased is also a police panch, to whom the police had called for two panchas. It was argued that though the discovery of weapon is not proved, PW-5 Dr. Devang Shah at Exh. 26 categorically stated that external injuries which the deceased had, could not have been inflicted by muddamal article knife. It was further submitted that in view of the medical evidence and in view of weakest discovery evidence, the case of the prosecution through so called got up eye witnesses should not be believed. Mr. Saiyed also drawn our attention to the fact that postmortem note Exh. 27 clearly indicated that the dead body of the deceased was brought to the Civil Hospital at Gandhinagar at 1930 hours. Police Constable Arjunsinh had brought the dead body to the Civil Hospital. It was submitted that Dr. Devang Shah PW-5 at Exh.26 also admitted in cross-examination that he received the dead body of the deceased at 1930 hours on 19.4.1994. According to learned Advocate, the deadbody was admittedly shifted to

Gandhinagar Hospital only after the inquest panchnama at Exh.10 which had been drawn during 1930 hours to 2000 hours on 19.4.1994, learned Advocate Mr.Saiyed submitted that how it could be possible that since the inquest panchnama was being drawn from 1930 hours to 2000 hours on 19.4.1994, deadbody could be handed over to the Hospital by Arjunsinh at 1930 hours on 19.4.1994 at Gandhinagar Hospital for postmortem. It was submitted that these discrepancies destroys the case of the prosecution and it transpires that the Investigating Officer has done something fishy and has roped both the accused in this serious crime. It was further submitted that according to the eye witnesses, the root cause of dispute between the deceased and the accused was some pending litigations, in which the deceased was asked to enter into compromise by the accused. It is submitted that this genesis or motive of the prosecution case has not been proved because nothing has come on the record to indicate that what were the litigations pending between the deceased and the accused.

11. Learned Advocate Mr. Saiyed submitted to acquit the accused of the charge levelled against them. Alternatively, it was also argued that there was no intention on the part of the accused to inflict such injuries as to cause murder of the deceased and the incident occurred on the spur of moment and if at all the accused are liable, then, they might have committed the offence under Section 304 Part-II of the Indian Penal Code. It was submitted that the accused are in jail for 9 years.

12. Learned APP Mr. L.R.Pujari, supported the judgment of the Trial Court and submitted that three eye witnesses were natural witnesses and there is no reason to discredit them. The conduct of PW-1 was natural in the circumstances. There may be mistake on the part of the Investigating Agency in noting timings of sending of dead body to the hospital but that itself is not a reason to overthrow the evidence of three eye witnesses. In the circumstances, according to Mr. Pujari, PW-1 Babubhai could not have gone to the Police Station and would have gone to his eldest brother who was residing only at the distance of one and half Kms away from the scene of offence. There is nothing, discredit worthy or unnatural conduct on the part of PW-1 in reaching Police Station at 1915 hours on the same day. Ultimately, it was stated that the murder was committed of younger brother in the presence of elder brother. In these circumstances, we cannot presume how one would react.

13. In light of the submissions made before us, we have carefully gone through record and proceedings of the Trial Court. We have evaluated and scanned all the testimonial collections as well as the documentary evidence produced before the Trial Court carefully. When we appreciated the evidence of PW-1 Babubhai, Exh. 18, we found that the evidence of Babubhai is creditworthy. He has stated that he was standing near the hand-cart of PW-2 Noormohamad along with PW-3 Yakubkhan. His presence at the scene of offence appears to be quite natural. He has deposed that he opens his cycle repairing shop situated near the Pethapur Bus stop at 8.00 or 8.30 in the morning and closes at 5.00 or 5.30 p.m. in the evening. The scene of offence is at a distance of 4 to 5 minutes from his shop of cycle repairing. Accordingly, as per routine, while he was proceeding towards his residence, he stopped at the larry of PW-2 where PW-3 Yakubkhan was also standing when the above said incident occurred. He was extensively cross-examined by the defence but nothing is brought about to disbelieve PW-1 Babubhai. True it is that he had not mentioned two facts in his complaint at Exh. 20. First about two blows inflicted and second about threatening of accused No.2 to prevent intervention of PW-1, but these are not the contradictions destroying the case of the prosecution. These are merely minor discrepancies or variance. Discrepancy or minor variance will have to be distinguished from contradictions. The contradiction in the statement of witness is undoubtedly fatal to the prosecution case while it should be contradiction and not variance. Minor discrepancy or variance in evidence will not make the prosecution case doubtful. This is so because the normal course of human conduct would be that while narrating a particular incident there may occur minor discrepancies, such discrepancies on the contrary in law may render credential to the deposition. It is know canon of law that parrot like statements are disfavoured by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard must be required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which he perceived the scene of crime and environment and the condition of a witness when he narrates the scene of crime to the authorities. The only improvement which is vehemently advanced by the defence in respect of this witness is in regard to two blows of knife given by the accused No.1. In complaint, witness stated one blow, and in deposition he stated two blows. PW-1 also deposed that he did not intervene because of the threats given by accused No.2. Now appreciating the

circumstances, it is clear that PW-1 had witnessed gruesome crime committed against his own younger brother causing the life of his brother. The so called contradiction or minor improvement attempted to magnify by the defence would be insignificant because it is revealed in the evidence that on the same day i.e. 19.4.1994 when PW-8 took investigation from Arjunsinh, recorded the further statement of PW-1 Babubhai @ Juber Ahmed Ismailbhai, wherein PW-1 categorically narrated that the accused No.1 inflicted two blows to the deceased and accused No.2 gave threat to prevent intervention. PW-1 is corroborated by the inquest panchnama Exh.10 drawn soon after the incident and by the medical evidence of PW-5 Dr.Devang Shah at Exh. 26 and by postmortem note at Exh. 27. The prosecution case itself is that accused No.2 threatened PW-1, Pw-2 and Pw-3 and prevented their intervention. This prosecution case though not disclosed by PW-1 in the complaint but this important disclosure is made by PW-2 Noormohammad Nazarmohammad Palani and PW-3 Yakubkhan Akbarkhan Pathan and that too soon after the incident because it is proved that I.O. recorded the statements of eye witnesses PW-2 and PW-3 on 19.4.1994 soon after the incident. No contradictions whatsoever are brought on the record by the defence in the cross-examination. Meaning thereby that PW-2 and PW-3 stated before the Court what they had stated before Police soon after the incident and consistently also. Both these witnesses, in this respect, corroborates PW-1 complainant Babubhai rendering defence argument baseless that there was contradiction and improvement in prosecution case. It would be noteworthy here that the statements of PW-2 Noormohammad and PW-3 Yakubkhan were recorded by Investigating Officer on 19.4.1994 and very promptly and while we appreciate the evidence of these two witnesses PW-2 and PW-3, we do not find any improvement or contradictions in the prosecution case as to two blows of knife and as to threat of accused No.2. Meaning thereby that the evidence of PW-1 cannot be thrown overboard on this count as submitted by learned advocate for the appellants because immediately the further statement of the PW-1 was recorded and there was no contradictions in the evidence of PW-1, PW-2 and PW-3, all the three eye witnesses. On the contrary, prompt action to record the statement on the part of the Investigating Agency would lend credence to the evidence of PW-1, Exh. 18 Babubhai @ Juberahmed Ismailbhai.

14. Much has been said about the conduct of this witness PW-1 Babubhai, criticising him in not approaching the Police Station which was 70 feet away from the scene of offence and going to GEB Colony to inform his eldest

brother. We do not find any manipulation in prosecution case on this score. Having witnessed murder of youngest brother, one would not be expected to run to the Police Station. In his evidence, PW-1 has stated categorically that he was confused and embarrassed and thereafter he decided to go to his elder brother to inform him, whose residence was situated at GEB Colony at a distance of 1 1/2 Kms. This reaction of the witness is not at all subject to criticism or unnatural. Different witnesses react differently under different situation. No court can except fixed pattern of natural conduct of witnesses. Expectation of said reactions itself is against the natural human conduct. In different circumstances, some become speechless, some start wailing while some other run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals to individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern would be futile and pedantic exercise. Though in the evidence, PW-1 stated that he reached at the residence of his brother at about 6.45 and after bringing his brother at the scene of offence at 7.15 in the evening he appeared before the Police Station. After the incident which occurred at 1730 hours and after sometime when the witness might have come out of his immediate shock, he must have walked 1 1/2 Kms for going to the residence and again 1 1/2 Kms. to come to the scene of offence and to approach before the Police Station. The timings as suggested by the learned Advocate of the appellants casts no doubt in the prosecution case. It could not be expected that either PW-2 or PW-3 present at the scene of offence to go to the police station to inform the police and it could not be said that since they have not performed this duty, their evidence cannot be believed. Weighing the evidence of PW-1 carefully and appreciating his evidence by strict judicial scrutiny, we could not find a single reason or a slightest indirect suspicion as to discredit the whole evidence of this witness, only because he happened to be the brother of the deceased and he stated one blow instead of two blows at the first instance when the complaint came to be recorded. We do not find any substance in the argument of the learned Advocate for the appellants that the evidence of PW-1 is required to be discarded.

15. So far as PW-2 Noormohammad Nazarmohamad Palani, Exh. 21 and PW-3 Yakubkhan Akbarkhan Pathan, Exh.22 are concerned, they have spontaneously stated the chronology

of event as it had happened. There is no contradictions brought about in any of these witnesses in cross-examination. Meaning thereby that each of these witnesses stick to their version given to the police soon after the incident on 19.4.1994. Nothing is suggested by the defence in the cross-examination that the presence of any of these witnesses would be doubtful at the scene of offence nor anything even suggested by the defence that any of these two witnesses had an axe to grind against both the accused to involve them in this serious crime. Only because they reside in the same mohlla in which complainant resides would not be sufficient to brand these witnesses as interested witnesses and it would be doing injustice to these witnesses to declare them discreditworthy, unreliable, not inspiring confidence. On that count, not a single line in the cross-examination could be shown by the learned Advocate for the appellants as to indicate that whatever stated by each of these witnesses in the examination in-chief was not trustworthy. Not only that, these two independent witnesses corroborate in all material particulars to the evidence of PW1.

16. On exercise undertaken to appreciate the evidence of eye witnesses PW-1, PW-2 and PW-3 as aforesaid, we have no hesitation at all to come to the conclusion that the case of the prosecution is proved by the evidence of these witnesses beyond reasonable doubt. There is nothing on the record to discard the evidence of the above important witnesses.

17. It was argued that as per Map at Exh.17, there are other shops and madresa, etc. are situated around the scene of offence and none has been examined by the Investigating Officer amongst them. We cannot accept the submission of the learned Advocate for the simple reason that only because of non-examination of such witnesses, the evidence of above said three witnesses cannot be discarded. That is not the rule of appreciation of evidence that unless the other available evidence is not examined, the evidence available on record requires to be discarded. Non-examination of such witnesses must be considered in the background of facts and circumstances of each case so as to find whether the witnesses were available for being examined in the court as and when they are required by the prosecution. The court has first to assess the trustworthiness of the evidence adduced and available on record. If court finds the evidence adduced worthy of being relied on, then, testimony has to be accepted and acted upon though there may be other witnesses available who could also have been

examined but were not examined. When we accept the version of PW1, PW2 and PW3 for the above discussed reasons, we find that accused No.2 Nisharahmed @ Katu Jahangirmiya Shaikh exhibited hostility towards these three witnesses. Such hostility in ordinary circumstances would normally deter anyone from the public extending their service or occasion to be a witness against them. When his own brother was prevented by accused No.2 to interfere and rescue his youngest brother, we do not expect that anyone else from the locality would come forward to give evidence against the accused. Moveover by the defence side, it has not been brought on record through the evidence of PW-8 Investigating Officer that he had recorded the statement of other witnesses available and they either supported or not supported the prosecution. Above all, on consideration, we have found that the evidence available on record is sufficient to book the accused - appellants for the crime for which they are charged with. In these circumstances, examination of other independent witnesses to prove the charge is immaterial. In these circumstances, the evidence available on record, while found creditworthy, the submission of learned Advocate for the appellant that independent witnesses are not examined, cannot be accepted.

18. We do not agree with the learned Advocate for the appellants that the medical evidence is not supporting the prosecution case. True it is that PW-5 Dr. Devang Shah at Exh. 26 in his cross-examination in a line deposed that the external injuries shown by him in postmortem note at Exh. 27 in Column No. 17 may not be possible by the muddamal article knife. The evidence of any witness must be considered as a whole. In the examination in chief, when PW-5 was confronted by the mudammal article knife he admitted that the external injuries which the deceased had, were possible by muddamal knife. There appears to have some error on the part of this witness. While reading the whole evidence of PW-5 Dr. Devang Shah, it clearly transpires that the deceased had two piercing wounds as per Cl. 17 of postmortem note Exh. 27. While appreciating further the cross-examination of PW-5, he has admitted that stab wounds as well as incise wounds are possible by weapon like knife. It be noted here that as per Cl.19 of postmortem note - Exh. 27, the deceased had incise wounds by way of internal injuries. Dr. Devang Shah further says in his cross-examination that stab wound and piercing wound are not different injuries. Meaning thereby that stab wound and piercing wound are the same kind of injuries. PW-5 has stated that the said wounds

were possible by weapon like knife and therefore while reading and appreciating the evidence of this Doctor as a whole, he has stated that piercing wound which caused to the deceased as external injuries which according to him were also stab wounds, were possible by knife. The corresponding internal injuries were incised wounds and those injuries also according to Dr. Devang Shah were possible by the weapon like knife. We, therefore, unable to agree with the learned Advocate for the appellants that the case of the prosecution is destroyed by the medical evidence.

19. True it is that so far as the discovery evidence is concerned, the panch of discovery panchnama - Exh. 29 PW-6 Babulal Sharma has not supported the prosecution case wholeheartedly. We may also say that the recovery of mudammal knife is not at the instance of the accused and discovery of weapon i.e. knife is not fully proved, but this fact itself is not fatal to the prosecution case and in view of the above discussed ocular evidence.

20. So far as receiving of deadbody by Doctor at the hospital on 19.4.1994 is concerned, there appears to be apparent error either on the part of PW-5 Doctor or on the part of investigating Agency. Inquest panchnama produced at Exh. 10 indicates that the panchnama was drawn at 1930 hours to 2000 hours on 19.4.1994. Undoubtedly, at 1930 hours on 19.4.1994, the dead body of the deceased could not have been handed over to PW-5 Dr. Devang Shah at Gandhinagar Hospital situated at 8 kms away from the scene of offence. In fact, it was the duty of the Investigating Officer in the prosecution to explain this mistake. But, unfortunately, the prosecution neither produced yadi handing over the body to the Doctor nor witness Arjunsinh has been examined. Panchnama Exh. 10 of inquest was admitted to evidence on record on admission of the accused, meaning thereby that the fact that the said panchnama was drawn at 1930 to 2000 hours on 19th of April, 1994 at the scene of offence was not disputed by the accused. If this is so, then timings mentioned in the postmortem note at Exh. 27 for receiving deadbody on 19.4.1994 by Dr. Devang Shah, PW-5 must be considered as a mistake on the part of the investigation Agency. Ultimately, such lapse on the part of the Investigating Agency, cannot dislodge weighty ocular evidence of three eye witnesses in respect of this incident. The lapse of the Investigating Agency if do not have the effect of causing any prejudice to the accused, then the same cannot be used to destroy the prosecution case or to be used to impeach the testimony of the eye witnesses and by merely showing the timings of

1930 hours of receiving of the dead body by the Doctor in postmortem note would not cause any prejudice to the accused more so when inquest panchnama - Exh. 10 was exhibited to the record and evidence by the consent of the accused with full knowledge that the dead body was at the scene of offence from 1930 hours to 2000 hours on 19.4.1994. Therefore, there is no substance in this submission on behalf of the appellants.

21. As discussed above, on appreciation of the evidence, it clearly appears that the deposition of informant PW-1 is fully corroborated by the rest of the two eye witnesses. Nothing is brought on record as to show that why PW-2 or PW-3 would attempt to rope the appellants in a serious crime like murder. The testimony and deposition of both the witnesses are without any contradictions or improvement and trustworthy. Therefore, the ocular evidence must precede over all other evidence. Even if the discovery is not proved, the same would not be fatal to the prosecution to prove the case. As said above, the prosecution case as disclosed through three eye witnesses PW-1, PW-2 and PW-3, is fully corroborated by the medical evidence. The First Information Report, as said above, must be regarded as filed promptly in the circumstances without any further delay. Not only that but right at the filing of the complaint at 1915 hours, the Investigating Agency has taken over sincere and honest investigation. We would not agree to the submission of learned Advocate of appellants that there is no fair investigation. It was also alleged by learned Advocate that First Information Report Exh.20 is fabricated afterwards. Arrest panchnama of the accused is also not prepared as proposed by prosecution. But we do not find any reason that why independent agency would attempt unfairly to rope in accused. It is noteworthy that in STATE GOVT. OF NCT OF DELHI vs. SUNIL AND ANOTHER, reported in (2001) 1 SCC 652, the Apex Court observed that:

> "It is an archaic notion that actions of the Police Officer should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents made by the police. AT any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognized even by

the legislature."

22. Investigating Agency started inquest panchnama right at 1930 hours, there is no reason to doubt recording the complaint at Exh. 20 only because under Section 154 the copy of the FIR is received by the Judicial Magistrate, First Class, late by 24 hours, would not weaken the prosecution case particularly in the circumstances when 20.4.1994 was a public holiday, the copy of the FIR was sent to the concerned Magistrate on 21.4.1994 at 1100 hours. The eye witnesses and the accused are known to each other, as revealed, the presence of all the three eye witnesses at the scene of offence cannot be doubted or at least when the prosecution has proved their presence at the scene of offence, the defence was not able to show a slightest suspicion in this respect. Having regard to the evidence on record, we are not able to accept the submission that the act was committed at spur of the moment and that the act was without premeditation. The evidence of eye witnesses PW-1, PW-2 and PW-3 are corroborating each other and in this view of the matter, we do not find any reason to accept the appeal of the appellants or to interfere in the finding of conviction recorded by the Trial Court.

23. In the result, for the reasons noted above, the appeal fails and dismissed.

(D.K. Trivedi, J.)

(J.R. Vora, J.)

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